IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 29TH NOVEMBER 2006 / 8TH AGRAHAYANA 1928

CRP.No. 633 of 2006()

I.A.883/05 IN
OS.195/2005 of MUN-MAGI COURT, SASTHAMCOTTA

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REVN. PETITIONER: PETITIONER/DEFENDANTS

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1. BRANCH MANAGER INDIAN BANK, BHARANIKAVU BRANCH.

2. THE CHIEF MANAGER, CIRCLE OFFICE, INDIAN BANK, ERNAKULAM.

BY ADV. SRI.T.K.AJITH KUMAR

RESPONDENTS: RESPONDENT/PLAINTIFF

KRISHNAMOORTHY, S/O.RAMAMOORTHY, PROPRIETOR, VEENA TEXTILES, BHARANIKAVU (P.O), SASTHAMCOTTAH, QUILON DISTRICT.

BY ADV. SRI.K.SUBASH CHANDRA BOSE

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 29/11/2006, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

Order on I.A.No.2307/06 in C.R.P.No.633/06

29.11.06 Dismissed Sd/- M.Sasidharan Nambiar
Judge

/true copy/

P.S. To Judge

M.Sasidharan Nambiar,J.

C.R.P.No.633 of 2006

Dated this the 29th day of November,2006

O.R.D.E.R

Petitioners are the defendants in O.S.195/05 on the file of Munsiff Court, Sasthamcottah. Respondent is the plaintiff. Respondent filed the suit seeking a decree for permanent prohibitory injunction restraining petitioner bank from trespassing into the plaint schedule property or transferring the property to third parties, admitting that respondent is a borrower from the petitioner bank. Petitioner filed written statement contending that suit is not maintainable by virtue of Section 34 of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act,2002, (hereinafter referred to as the Act). As per order dated 12.4.06, Munsiff dismissed I.A.883/05 filed by petitioners challenging the maintainability of the suit and held that suit is maintainable. It is

challenged in this revision petition filed under section 115 of the Code of Civil Procedure.

2.Learned counsel appearing for petitioners and respondent were heard.

3. Learned counsel appearing for petitioners pointed out that respondent had borrowed the amount from petitioner bank and when respondent committed default, the Bank issued notice as provided under sub section (2) of Section 13 of the Act and instead of filing objection, respondent rushed to the court and filed the suit which is barred under section 34 of the Act. It was also argued that learned Munsiff without properly appreciating the provisions of Section 34 or following the decision of the Apex Court, relying on a decision of the Apex Court in **Dhulabhai v. State of Madhya Pradesh (AIR 1969 SC 78)** rendered much earlier to the enactment of the Act held that the suit is maintainable and that order is illegal and unsustainable.

4. Learned counsel appearing for respondent argued that all suits are not barred under section 34 and Apex Court has held that there are exceptions to the bar provided under section 34 and when fraud is alleged the suit is maintainable. It was argued that notice contemplated under section 13(2) of the Act is a notice providing the details of the amount due and the notice served on the respondent does not disclose the details and instead the total amount without the details is claimed and it is not a notice as provided under section 13(2) and hence the suit is maintainable.

5.Section 13(2) and (3) of the Act reads:-

> (2)"Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor

as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

(3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower."

The bar of suits provided under section 34 reads:-

"No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any

> matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993).”

The Constitutional validity of the Act was considered by the Apex Court in **Mardia Chemicals v. Union of India (2004(2) KLT 273).** Upholding the constitutional validity and repelling the contention against Section 34, their Lordship held:

> “50. It has also been submitted that an appeal is entertainable before the Debt Recovery Tribunal

only after such measures as provided in sub-section(4) of Section 13 are taken and Section 34 bars to entertain any proceeding in respect of a matter which the Debt Recovery Tribunal or the appellate Tribunal is empowered to determine. Thus before action or measure is taken under sub-section (4) of Section 13, it is submitted by Mr.Salve one of the counsel for respondents that there would be no bar to approach the civil court. Therefore, it cannot be said no remedy is available to the borrowers. We, however, find that this contention as advanced by Shri Salve is not correct. A full reading of section 34 shows that the jurisdiction of the

civil court is barred in respect of matters which a Debt Recovery Tribunal or Appellate Tribunal is empowered to determine in respect of any action taken”or to be taken in pursuance of any power conferred under this Act”. That is to say the prohibition covers even matters which can be taken cognizance of by the Debt Recovery Tribunal though no measure in that direction has so far been taken under sub-section (4) of Section 13. It is further to be noted that the bar of jurisdiction is in respect of a proceeding which matter may be taken to the Tribunal. Therefore, any matter in respect of which an action may be taken even later on, the civil court

> shall have no jurisdiction to entertain any proceeding thereof. The bar of civil court thus applies to all such matters which may be taken cognizance of by the Debt Recovery Tribunal, apart from those matters in which measures have already been taken under sub-section(4) of Section 13."

Their Lordships also considered the exception of the bar and held:-

> "51. However, to a very limited extent jurisdiction of the civil court can also be invoked, where for example, the action of the secured creditor is alleged to be fraudulent of their claim may be so absurd and untenable which may not require any probe, whatsoever or to say precisely to the extent the scope is

permissible to bring an action in the civil court in the cases of English mortgages”

6. The facts of the case establish that petitioner bank had already initiated steps under the Act. A notice as provided under section 13(2) was sent to the respondent. According to learned counsel appearing for petitioners inspite of the service of notice, respondent did not file any objection. When a notice as provided under section 13(2) of the Act is sent to a borrower and borrower files an objection as provided under section 13(3A) the borrower has a right to raise any objection to the said notice. Sub section (3A) provides that on receipt of the notice under sub section 2, if the borrower makes objection,the secured creditor shall consider such representation or objection and if on such consideration comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of

receipt of such representation or objection the reasons for non-acceptance of the representation or objection. But the proviso to the sub section makes it clear that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section 17A of the Act. The right of the borrower to approach the Debt Recovery Tribunal will accrue only after measures are taken under section 13(1) of the Act.

7. The question is whether in the light of these provisions a borrower, without filing an objection to the notice under section 13(2), who is not entitled to prefer a petition under section 17, even if he has filed objection and it was found untenable and the reasons was communicated can institute a civil suit in a civil court seeking a decree for injunction restraining the

bank from entering the mortgaged property or putting the property for sale. The argument of the learned counsel appearing for respondent was that as the notice does not contain the details of the amount as provided under sub section 3 of Section 13 respondent is entitled to approach the civil court for the remedy. I cannot agree with the submission. When the respondent did not dispute the amount due and did not claim that the notice sent under section (2) is bad for non-mentioning the details as provided under sub section (3), he is not entitled to circumvent the provisions of the Act or avoid the bar under section 34 contending that notice did not disclose the details. If the notice does not contain the details as contemplated under sub section 3, he should have filed representation or objection as provided under sub section 3A. It is definitely not a ground to file a suit inspite of the bar provided under section 34. Unfortunately court below did not appreciate the provisions of

Section 34 in the proper perspective. It appears that the decision of the Apex Court was not brought to the notice of the court. It is absolutely clear that the suit is barred under the provisions of Section 34 of the Act. The impugned order is set aside and it is held that suit is barred under section 34 of the Act. It is made clear that respondent is entitled to approach the Bank for one time settlement. If such a representation for one time settlement is made to the Bank, Bank has to consider the same and pass appropriate orders. Respondent is also entitled to approach the Bank for the details of the amount due and if such a representation is made, the Bank shall furnish the details.

Civil Revision is disposed as above.

M.Sasidharan Nambiar
Judge

tpl/-

M.SASIDHARAN NAMBIAR, J.

C.R.P.NO.633 /06

ORDER

29TH NOVEMBER,2006